NO. 95389-9

SUPREME COURT OF THE STATE OF WASHINGTON

In re the Detention of Gregory Eugene Coley:

STATE OF WASHINGTON,

Respondent,

v.

GREGORY EUGENE COLEY,

Petitioner.

ANSWER TO PETITION FOR REVIEW

ROBERT W. FERGUSON
Attorney General

KRISTIE BARHAM
Assistant Attorney General
WSBA #32764 / OID #91094
Office of the Attorney General
Criminal Justice Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
(206) 389-2004

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

I. INTRODUCTION

Gregory Coley is sexually aroused by non-consensual sexual acts with females that involve coercive, sadistic, and pedophilic traits. In 2002, he stipulated to civil commitment as a sexually violent predator. In 2016, a jury re-committed Coley as a sexually violent predator after an unconditional release trial. At trial, Coley raised a *Batson*[1] challenge after the State used a peremptory challenge to strike a black juror. The trial court found that the State offered race-neutral reasons for striking the juror. After considering the totality of circumstances, and noting that it shared the State's race-neutral concerns, the trial court found that the challenge was not racially motivated. The Court of Appeals acknowledged that it owed great deference to a trial court's findings and properly concluded that the State's race-neutral reasons were supported by the record and that the trial court did not err in concluding that the challenge was not racially motivated.

The trial court also properly limited the testimony of Coley's expert, who sought to testify about opinions not disclosed in his report or during his deposition. Despite the limitation, Coley's expert was permitted to testify about all aspects of Coley's diagnosis and present his theory of the

[1] *Batson v. Kentucky,* 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

case. Coley has not shown that review is warranted under any of the criteria outlined in RAP 13.4(b). This Court should deny review.

II. RESTATEMENT OF THE ISSUES

For the reasons stated below, this Court should deny review. If this Court accepts review, the issues for review would be:

A. Where the trial court found that the State offered race-neutral reasons for striking a juror and that Coley failed to prove purposeful discrimination, did the Court of Appeals properly give deference to those findings and correctly conclude that the trial court's ruling was not clearly erroneous?

B. Where a new proposed court rule addressing the *Batson* framework is currently pending before this Court in its administrative rulemaking capacity, should this Court adopt a new standard and circumvent that process?

C. Where Coley attempted to elicit diagnostic testimony from his expert that was not disclosed during discovery, did the trial court abuse its discretion by minimally limiting the expert's testimony without affecting Coley's ability to present a vigorous defense as to all aspects of Coley's diagnosis?

III. STATEMENT OF THE CASE

In 2002, Coley stipulated to civil commitment as a sexually violent predator. CP at 260-66. In January 2016, the court held an unconditional release trial. CP at 220-21. The day after the jury was empaneled, Coley raised a *Batson* challenge after the State exercised a peremptory challenge against one of two black jurors in the venire. RP at 132-43; CP at 163. Coley acknowledged that he "may be making this motion a little bit late" and the State challenged

the motion as untimely. RP at 140-41. The State provided race-neutral reasons for striking the juror, specifically that the juror held strong opinions about brain chemistry and the evolution of people's brains and spoke more frequently than the other jurors. *See* RP at 141-43; CP at 163. Given that a central issue at trial involved mental illness and the functioning of Coley's brain, the State expressed concerns that the juror's opinions would override his ability to objectively evaluate expert testimony. *Id.* The trial court conducted a complete *Batson* analysis and found that the State provided race-neutral reasons for striking the juror and that Coley failed to prove purposeful discrimination. RP at 139-44, 957-59; CP at 162-64. During trial, Coley sought to elicit testimony from his expert, Dr. Richard Wollert, which had not been disclosed during discovery. RP at 847-55. The State objected, and the trial court ruled that Dr. Wollert could not testify to opinions outside of his report. RP at 854-55. The jury unanimously found that Coley is a sexually violent predator, and the trial court entered an order of commitment. CP at 152, 269. Coley timely appealed.

IV. REASONS WHY REVIEW SHOULD BE DENIED

A. Standard of Review

A petition for review will be accepted by this Court only: (1) If the Court of Appeals decision conflicts with a decision of the Supreme Court; (2) If the Court of Appeals decision conflicts with a published Court of Appeals decision; (3) If there is a significant question of constitutional law;

or (4) If there is an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b). Coley raises a *Batson* issue and makes a blanket assertion, without any supporting argument, that review is warranted under "all RAP 13.4(b) criteria[.]" *See* Petition at 7-8. Issues not supported by argument and citation to authority will not be considered on appeal. *State v. Farmer,* 116 Wn.2d 414, 432, 805 P.2d 200 (1991). Coley fails to cite to any appellate decision that conflicts with the Court of Appeals decision, nor has he shown that the decision involves a significant question of constitutional interest or an issue of substantial public interest. There is no basis for review under RAP 13.4(b).

B. The Court of Appeals Properly Found That the State Provided Race-Neutral Reasons for Striking the Juror and That Coley Failed to Prove Purposeful Discrimination

Coley argues that the State's race-neutral reasons for challenging Juror No. 5 are not supported by the record and that the Court of Appeals "endorsed the State's discriminatory intent" by "refusing to meaningfully consider the record[.]" Petition at 6-7. Without elaborating, Coley makes a blanket assertion that review is warranted under "all RAP 13.4(b) criteria." Petition at 7-8, 10-12. Contrary to Coley's claims, the record shows that the State provided race-neutral reasons for striking Juror No. 5 and that the Court of Appeals, after weighing the circumstances, agreed that Coley failed to prove purposeful discrimination. There is no basis for review.

1. The State Provided Race-Neutral Reasons for Striking Juror No. 5

Batson sets forth a three-part analysis for determining whether a peremptory strike unconstitutionally discriminates based on race. *Batson,* 476 U.S. at 93-98. First, the defendant must establish a prima facie case giving rise to an inference of purposeful discrimination. *Id.* at 93-94. Second, the burden then shifts to the State to provide a race-neutral reason for the challenge. *Id.* at 94, 97. Third, the trial court must then weigh all relevant circumstances and decide if the defendant has proved purposeful racial discrimination. *Id.* at 98; *City of Seattle v. Erickson,* 188 Wn.2d 721, 727, 734, 398 P.3d 1124 (2017). As part of the "purposeful discrimination" analysis, courts have applied a comparative juror analysis, which examines whether the race-neutral explanation could apply just as well to a nonminority juror who was allowed to serve. *State v. Saintcalle,* 178 Wn.2d 34, 43, 309 P.3d 326 (2013) (citing *Miller-El v. Dretke,* 545 U.S. 231, 241, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005)), *abrogated on other grounds by Erickson,* 188 Wn.2d 721, 398 P.3d 1124 (2017). A trial court's decision on a *Batson* challenge is entitled to great deference and will be reversed only if the defendant shows it was "clearly erroneous." *Erickson,* 188 Wn.2d at 727.

The Court of Appeals properly found that the State provided race-neutral reasons for challenging Juror No. 5. *In re Det. of Coley,*

No. 74770-3-I, 2017 WL 4640320, at *4 (Wash. Ct. App. Oct. 16, 2017). Because Coley failed to raise a *Batson* challenge until the day after the venire was excused and jurors were sworn in, the State noted that "unfortunately, to be honest, I don't recall every answer that he gave yesterday[.]" RP at 141. Despite being handicapped by Coley's delay, the State provided race-neutral reasons for striking Juror No. 5, specifically that the juror held strong opinions about brain chemistry and the evolution of people's brains and spoke more frequently than the other jurors. *See* RP at 141-43; CP at 163. Juror No. 5 stated that "the brain chemistry of homo sapiens is still in the Stone Age although we live in the modern world. The rate at which civilization has progressed is much faster than evolution. So the brain chemistry is still chromatic or Stone Age." RP at 88. After a brief discussion about experiencing racism, Juror No. 5 said, "I still maintain my pure scientifically-trained objectivity and I want to see the facts." RP at 89. When Coley's attorney asked if he believed most people could be as objective as he is, Juror No. 5 responded, "I think people think they are objective until the issue touches their core issues. And then once again, the Stone Age brain chemistry takes over. That's my experience." RP at 89-90.

In light of the fact that a central issue at trial involved mental illness and how Coley's brain functioned, the State expressed valid concerns that Juror No. 5's opinions would override his ability to objectively listen to the

testimony of the mental health experts and form an opinion based on the evidence. S*ee* RP at 142; CP at 163. Knowing that expert testimony would involve how brain development and neurons in the brain work, the State understandably expressed concerns about the juror's ability to fairly evaluate this evidence in light of his stated views on brain chemistry. *See e.g.* RP at 820-23. The crux of his opinion was that the Stone Age brain chemistry of homo sapiens affects *everyone's* ability to be objective, and yet somehow he is able to maintain his "pure scientifically-trained objectivity." RP at 89-90. The State had valid concerns that these opinions would affect his ability to follow the court's instructions to impartially consider the evidence, listen to other jurors carefully, and be willing to re-examine his opinions based on the evidence. *See* CP at 105-07.

The State's concerns were magnified by the fact that Juror No. 5 spoke more frequently than other jurors, which is supported by the record. *See* RP at 17-131, 141-43, 957-59; CP at 162-64. Juror No. 5 spoke more than any other juror during the State's opening round of voir dire, most of the time without being called on. *See* RP at 18-19, 25, 34-35. During all of voir dire, Juror No. 5 spoke more times than any other juror in the panel, with the exception of Juror No. 8, whom the State also struck using a peremptory

challenge. CP at 310; *see* RP at 17-131.[2] Furthermore, not one of the thirteen jurors who were seated on the panel spoke as frequently as Juror No. 5. *See* RP at 18-21, 24-28, 30-35, 52-54, 60, 64-65, 71-72, 78-80, 87-91, 93-102, 107-08, 111-21.[3] The majority of empaneled jurors spoke only once or twice. *Id.* Thus, under a comparative juror analysis, the State's explanation applied equally to nonminority jurors and was not pretextual. *See Saintcalle,* 178 Wn.2d at 43.

The State's race-neutral explanation "need not rise to the level justifying exercise of a challenge for cause." *Batson,* 476 U.S. at 97. Under the second step of the *Batson* analysis, the issue is the facial validity of the State's explanation, which "does not demand an explanation that is persuasive, or even plausible", as long as it is not inherently discriminatory. *Purkett v. Elem,* 514 U.S. 765, 767-68, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995). "Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Id.* at 768. The State's explanation for striking Juror No. 5 was race-neutral and did not involve any discriminatory intent.

---

[2] Juror No. 5 answered questions on 5 occasions. RP at 18-19, 25, 34-35, 78-80, 88-90. Juror No. 8 answered questions on 7 occasions. RP at 17-18, 32-33, 54-55, 59, 94, 102-03, 106. The majority of jurors either did not speak at all or spoke one or two times. (16 jurors did not speak; 21 jurors spoke once; 12 jurors spoke twice; 11 jurors spoke three times; 3 jurors spoke four times; and no jurors spoke six times.) *See* RP at 17-131.

[3] The following thirteen jurors were seated on the panel: 6, 7, 11, 14, 15, 17, 18, 19, 21, 22, 25, 27, 29. CP at 310-14.

2. The Court of Appeals Properly Found That the Record Supports the Trial Court's Ruling that the Peremptory Challenge Was Not Racially Motivated

Coley bears the burden of proving purposeful discrimination. *See Purkett,* 514 U.S. at 768. The trial court found that Juror No. 5 was "quite active" in the conversation, and the Court of Appeals agreed that Juror No. 5 "responded and interjected more than other prospective jurors." RP at 143; CP at 163; *Coley,* 2017 WL 4640320, at *4. The trial court noted Juror No. 5's opinions about brain chemistry and shared the State's concerns "after hearing some of his answers." *See* RP at 143, 958-59; CP at 163. The Court of Appeals weighed the totality of circumstances and agreed that the State's peremptory challenge was not racially motivated:

> The State's case turned largely on expert testimony regarding Coley's mental impairments and his ability to overcome those impairments. A juror with a strongly held view on how individuals' brains work when trying to remain objective may also have a rigid mindset on other aspects of mental functioning. The State's concern did not equate to racial animus.

Coley, 2017 WL 4640320, at *4.

The trial court's in-person examination of the credibility and demeanor of the prosecutor and jurors is essential in a *Batson* analysis. *Erickson,* 188 Wn.2d at 735. A trial court's decision on discriminatory intent should be given "great deference" on appeal. *Hernandez v. New York,* 500 U.S. 352, 364, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991).

Such deference is necessary "because a reviewing court, which analyzes only the transcripts from voir dire, is not as well positioned as the trial court is to make credibility determinations." *Miller-El v. Cockrell,* 537 U.S. 322, 339, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003). When an appellate court accepts a trial court's finding that the prosecutor's race-neutral explanation should be believed, "we fail to see how the appellate court nevertheless could find discrimination." *Id.* at 339-40. Here, the trial court's ruling that the State's challenge was not racially motivated must be given great deference. *See Hernandez,* 500 U.S. at 364. The trial court was in the best position to judge the credibility of the juror and prosecutor and specifically indicated that it shared the State's concerns. *See* RP at 958-59. Coley has not met his burden of proving purposeful discrimination, and there is no basis for review.

3. Coley Misconstrues the Applicability of the First Step of the *Batson* Analysis to His Case

Under the first step of the *Batson* analysis, a pattern of discrimination is not required to make a prima facie showing of purposeful discrimination. *Erickson,* 188 Wn.2d at 732-33. Coley's argument that this was "the principal reason" the trial court denied his *Batson* challenge is not supported by the record. *See* Petition at 12. Although the trial court referenced the lack of a pattern in its oral ruling, it did not include this as a basis in its final written order. CP at 162-64; RP at 141-44. A trial court's

oral decision is no more than an informal opinion that has no final effect unless formally incorporated into the findings, conclusions, and order. *State v. Head,* 136 Wn.2d 619, 622, 964 P.2d 1187 (1998). The Court of Appeals properly found that the trial court separately considered the State's race-neutral reasons and concluded they did not constitute purposeful discrimination. *See Coley,* 2017 WL 4640320, at *2-3.

In a footnote, Coley argues that it "is both troubling and telling that the Court of Appeals refused to acknowledge the racial composition of the jury" and that the "baseless State-drafted findings" is evidence of discriminatory intent. Petition at 7, n. 2. This argument lacks merit. First, the racial composition of the jury was not relevant to the Court of Appeals analysis because the State offered race-neutral reasons before the trial court determined if Coley made a prima facie case of purposeful discrimination. *See* RP at 139-44. This collapse of the first and second steps of *Batson* renders the preliminary issue of whether Coley made a prima facie showing moot. *See Hernandez,* 500 U.S. at 359. Thus, *Erickson's* bright-line rule did not apply. *See Erickson,* 188 Wn.2d at 733-36. Second, the record supports the trial court's findings that Juror No. 5 was not the sole black juror in the venire, and Coley agreed with these findings. RP at 139-43, 957-59; CP at 163.[4] There is no basis for review.

[4] Coley never argued that there was only one black juror in the venire. Rather, he argued that there was only one black juror who "would have been within the group of 13" seated on the jury. RP at 139. The trial court indicated that there appeared to be only one

C. This Court Should Allow the Pending Rulemaking Process to Address Whether the *Batson* Framework Should Be Altered

Coley argues that the Court of Appeals "refusal to consider an alteration to the *Batson* framework conflicts with the constitutional decisions of this court[.]" Petition at 14. The Court of Appeals properly recognized that this Court did not alter the *Batson* standard of purposeful discrimination in *Erickson* and declined to adopt a new rule out of deference to this Court's pending rulemaking process. *Coley,* 2017 WL 4640320, at *4 (citing *Erickson,* 188 Wn.2d at 732-34). Furthermore, the Court of Appeals was required to follow the standard articulated by this Court in *Erickson. See 1000 Virginia Ltd. P'ship v. Vertecs Corp.,* 158 Wn.2d 566, 578, 146 P.3d 423 (2006) (a decision by the Supreme Court is binding on all lower courts in the state). The Court of Appeals did not violate the constitution by properly following controlling authority of this Court. Coley has not shown any basis for review.

This Court "has convened a work group to carefully examine the proposed court rule" to develop a meaningful, workable approach that will consider "far broader perspectives than can be heard in a single appeal." *Erickson,* 188 Wn.2d at 739 (Stephens, J., concurring). This Court should decline to adopt a new standard and allow this rulemaking process to occur.

---

black juror who was "seated on the left side of the courtroom," which was where the jury was ultimately empaneled from. *See* RP at 143.

This Court should also decline Coley's request to stay his petition pending adoption of a new rule that would not apply retroactively to his case. *See Letourneau v. State Dep't of Licensing,* 131 Wn. App. 657, 665, 128 P.3d 647 (2006) (strong presumption that statutes and rules apply prospectively only); *see also* GR 9(h) and GR 9(i) (all court rules published for comment in January and subsequently adopted by the Supreme Court shall take effect the following September 1).

D. The Trial Court Did Not Abuse Its Discretion by Limiting Dr. Wollert's Testimony to Opinions Disclosed During Discovery

Coley argues that the trial court erred in limiting Dr. Wollert's testimony based on a "discovery violation" and that the court should have conducted a *Burnet*[5] analysis before excluding evidence he now claims was "essential" to his defense. Petition at 15. Without elaborating, Coley argues that review is warranted "under all RAP 13.4(b) criteria." Petition at 15. To the contrary, Coley has not shown that review is warranted under any criteria. "A trial court has broad discretion in ruling on evidentiary matters and will not be overturned absent manifest abuse of discretion." *Sintra, Inc. v. City of Seattle,* 131 Wn.2d 640, 662-63, 935 P.2d 555 (1997). An abuse of discretion occurs only when no reasonable person would take the view adopted by the court. *State v. Castellanos,* 132 Wn.2d 94, 97,

[5] *Burnet v. Spokane Ambulance,* 131 Wn.2d 484, 933 P.2d 1036 (1997).

935 P.2d 1353 (1997). The trial court did not abuse its discretion by narrowly limiting the scope of Dr. Wollert's testimony to opinions expressed in his report and disclosed during discovery. There is no basis for review under RAP 13.4(b).

1. The Trial Court Properly Limited Dr. Wollert's Testimony About Pedophilia

At trial, Dr. Wollert testified that Coley does not meet the criteria to be diagnosed with Pedophilia. RP at 847. Dr. Wollert also testified about why one of Coley's offenses does not meet the criteria for Pedophilia. RP at 846-47. After Coley asked Dr. Wollert if he agreed with Dr. Arnold's opinion that another incident indicated evidence of Pedophilia, the State objected. RP at 847-48. A colloquy ensued where the State objected to Dr. Wollert testifying to new opinions not disclosed in his report or during discovery. RP at 850-53. Less than two weeks before trial, the State deposed Dr. Wollert and asked him whether he believed he needed to write an updated evaluation after reviewing Dr. Arnold's report, which included opinions about pedophilic traits. RP at 851.[6] Dr. Wollert said no. RP at 851. The State then asked Dr. Wollert if he was going to testify to any additional opinions not contained in his report, and Dr. Wollert again said no. RP at 851-53. Dr. Wollert's report does not address Dr. Arnold's diagnosis

[6] Dr. Wollert wrote his report before Dr. Arnold's November 2, 2015 report. RP at 850-51. The State deposed Dr. Wollert on December 30, 2015, and trial commenced on January 11, 2016. RP at 2, 851.

of Other Specific Paraphilic Disorder with coercive, sadistic, and pedophilic traits. *See* RP at 434-35, 441, 588, 851. Rather, Dr. Wollert's report only addresses why Coley does not meet criteria for a rape paraphilia known as "Paraphilia Not Otherwise Specified (NOS) Nonconsent," which is alternatively referred to as "Paraphilic Coercive Disorder." *See* RP at 850-51. Dr. Arnold did not diagnose either of these disorders. *Id.*

Coley's argument that "there is no substantive difference" between "paraphilia NOS" and "other specified paraphilic disorder" mischaracterizes the diagnosis rendered and the very limited testimony the State sought to exclude. *See* Petition at 17-18. Dr. Arnold's diagnosis was not a generic paraphilia diagnosis such as "paraphilia NOS" or "other specified paraphilic disorder," but rather a specific diagnosis involving coercive, sadistic, and pedophilic traits. RP at 434-35, 441, 588, 851. The State's objection was limited to Dr. Wollert's testimony about *pedophilic* traits because there was "nothing in his report" to understand the basis of his opinion and it was being disclosed for the first time during trial. RP at 847-53. The State did not object to Dr. Wollert's testimony about coercive and sadistic traits because he discussed those traits in his report. RP at 829-35, 852, 856, 862-67, 884. However, Dr. Wollert's failure to disclose any opinions about pedophilic traits prevented the State from effective trial preparation:

> And I asked him very specifically do you anticipate testifying to other opinions, and if he had said yes, I would have said what are they. He could have told me all of this, I could have asked him questions about it. I could have done much more research, if necessary done an additional deposition. But when he says no, that's it for me. That means I'm going to testify to my report.

RP at 853.[7]

Coley's reliance on *In re Meirhofer,* 182 Wn.2d 632, 343 P.3d 731 (2015) and *State v. Klein,* 156 Wn.2d 102, 124 P.3d 644 (2005) is misplaced. *See* Petition at 18-19. *Klein* held that an insanity acquittee is not required to suffer from the same mental disorder throughout commitment. *Klein,* 156 Wn.2d at 119-21. Relying on *Klein, Meirhofer* held that a change in diagnosis during commitment is insufficient to warrant a new trial. *Meirhofer,* 182 Wn.2d at 644. Contrary to *Klein* and *Meirhofer,* Coley's case does not involve a change in diagnosis or diagnostic terminology. Rather, the issue is whether the trial court properly limited the scope of Dr. Wollert's testimony about Pedophilia after Dr. Wollert disclosed that he would not be offering any opinions about such a diagnosis. *See* RP at 851-53. The purpose of discovery is to allow production of all relevant facts and thereby narrow the issues at trial. *Cedell v. Farmers Ins. Co. of Washington,* 176 Wn.2d 686, 698, 295 P.3d 239 (2013).

---

[7] Coley also did not respond to interrogatories requesting information about his expert's opinions. RP at 851.

The trial court explained why Dr. Wollert should be limited to opinions disclosed during discovery, comparing it to a report from a laboratory:

> You are limited to what's in the report. They can't put half of the stuff in the report and come into court and talk about what's in the report and a bunch of stuff that isn't in the report.

RP at 854. While Coley is entitled to present a defense, he is not entitled to do so by concealing information when explicitly asked by the State in a deposition and then seeking to ambush the State at trial.

Coley also argues that ER 703 permits Dr. Wollert to "express any opinion he wanted about what the State's expert said at trial." Petition at 16-17. Coley's argument lacks merit. First, Coley never raised this issue to the trial court and never asserted that Dr. Wollert intended to offer an opinion based on Dr. Arnold's trial testimony. *See* RP at 847-56. On the contrary, Coley claimed that the testimony he sought to elicit from Dr. Wollert was contained in his report. *See* RP at 849-50. Failure to raise an issue before the trial court generally precludes the party from raising it on appeal. *Wilcox v. Basehore,* 187 Wn.2d 772, 788, 389 P.3d 531 (2017); RAP 2.5. Second, Dr. Arnold's diagnostic opinion was known to Dr. Wollert prior to trial and prior to being deposed by the State. RP at 850-53. It would be improper to allow Dr. Wollert to subvert the discovery process by misleading the State and concealing his opinions in an attempt to admit testimony under the guise of ER 703. Coley has not shown that the decision of the Court of Appeals conflicts with any appellate decision.

Coley also argues that review is warranted under RAP 13.4(b)(4) because the Court of Appeals "seemingly requires experts to affirmatively state their reasons for *not* reaching certain opinions" and that it is "impossible to state every basis for *not* reaching a certain opinion." Petition at 19-20 (emphasis in original). First, Coley fails to cite to any part of the court's decision that suggests such an analysis. Second, Coley's argument ignores the context in which Dr. Wollert stated that he would not testify to anything outside of his report. After reviewing Dr. Arnold's report, which included a diagnosis involving pedophilic traits, Dr. Wollert testified under oath that he would not be testifying to any additional opinions. *See* RP at 851-53. The State was entitled to rely on this response. Coley has not shown how the Court of Appeals decision "requires the impossible from expert witnesses" and review should be denied.

2. The Testimony Coley Sought to Elicit Was Not Excluded and Coley Failed to Make an Offer of Proof of Additional Testimony He Wanted to Elicit From Dr. Wollert

Coley argues that the trial court erred in what he refers to as the "wholesale exclusion" of Dr. Wollert's "responsive testimony." Petition at 20-23. First, the testimony Coley sought to elicit was not excluded and was in the record for the jury's consideration. RP at 862-65. Second, Coley failed to make an offer of proof regarding any additional testimony he wanted to elicit.

The testimony that is the basis of Coley's claim of error was not excluded and was in the record for the jury to consider. Coley ignores the fact that the State objected *after* Dr. Wollert answered the questions and did not move to strike the testimony; thus, the testimony was in the record for the jury's consideration. *See* RP at 864-65.[8] "When an objection is sustained with no further motion to strike the testimony and no further instruction for the jury to disregard the testimony, the testimony remains in the record for the jury's consideration" and may be referenced during closing argument. *State v. Stackhouse*, 90 Wn. App. 344, 361, 957 P.2d 218 (1998) (citing *State v. Swan,* 114 Wn.2d 613, 659, 790 P.2d 610 (1990)); *see also State v. Jones,* 70 Wn.2d 591, 597, 424 P.2d 665 (1967) ("objection to a question after it has been answered comes too late"). Thus, Dr. Wollert's testimony was in the record for the jury to consider. Coley's entire argument rests on the false premise that the testimony was excluded and not before the jury.

Furthermore, Coley failed to make an offer of proof regarding any additional testimony he wanted to elicit, and the nature of such testimony is

---

[8] Following are excerpts from the trial testimony: Question: "Do you find any evidence for anything less than sadism?" Answer: "What do you mean by less?" Question: "I don't know. Is there anything less?" Answer: "There is nothing less." After the answer, the court sustained the State's objection. RP at 864-65. Question: "You indicated that there isn't a box for other specified paraphilic disorder. Do you know why?" Answer: "No, there's a box, but there is no text." After the answer, the court sustained the State's objection. RP at 864. Dr. Wollert had previously testified to this same information. RP at 863. The State did not ask for a motion to strike the answers or request that the court instruct the jury to disregard the answers. RP at 864-65.

not apparent from the context of the record. Although Coley claims for the first time on appeal that the excluded evidence was "essential" to his defense, he never made this claim to the trial court and never made an offer of proof to inform the court of the specific nature of any additional testimony he wanted to elicit. *See* RP at 848-55, 862-65. Coley only cites to testimony from Dr. Wollert that occurred *after* the trial court had already heard argument and ruled on the State's objection. *See* Petition at 21-22 (citing RP at 862-65); *see also* RP at 847-55. During this testimony, Coley failed to make any record that he wanted Dr. Wollert to testify to additional opinions. RP at 862-65. In fact, Coley failed to offer any argument about the State's objection. *See* RP at 864. Contrary to Coley's claim, it is not clear from the questioning what additional testimony Coley wanted to elicit that was so essential to his defense. *See id.* at 862-65.

The burden is on the proponent of the evidence to make an adequate offer of proof:

> [I]t is the duty of a party to make clear to the trial court what it is that he offers in proof, and the reason why he deems the offer admissible over the objections of his opponent, so that the court may make an informed ruling. If the party fails to so aid the trial court, then the appellate court will not make assumptions in favor of the rejected offer.

Mad River Orchard, Inc. v. Krack Corp., 89 Wn.2d 535, 537, 573 P.2d 796 (1978). An offer of proof must be "sufficient to advise the appellate court

whether the party was prejudiced by the exclusion of the evidence." *Coley,* 2017 WL 4640320, at *6 (quoting *State v. Vargas,* 25 Wn. App. 809, 817, 610 P.2d 1 (1980)); *Sutton v. Mathews,* 41 Wn.2d 64, 67-68, 247 P.2d 556 (1952) (appellate court will not assume what a witness' answer would have been or reverse a case on the mere chance that the answer would have been favorable to appellant).

The Court of Appeals noted that "Coley made no offer of proof and it is not clear from the colloquy or context what specific testimony was being proffered." *Coley,* 2017 WL 4640320, at *7. As the Court of Appeals properly found, "Coley asks this court to speculate whether the limitations had any meaningful impact on the outcome of the trial[,]" which would improperly reward a party "who loses a motion to exclude evidence, does not mention *Burnet,* and does not make an offer of proof." *See id.* at *8. The Court properly concluded that Coley has not shown a basis for relief.

3. The Trial Court Was Not Required to Engage in a *Burnet* Analysis Before Minimally Limiting the Scope of Dr. Wollert's Testimony

Coley argues that the trial court erred in failing to conduct a *Burnet* analysis before limiting Dr. Wollert's testimony. Petition at 20-21. *Burnet* does not apply because there was no discovery order involved and the trial court's ruling was not based on a discovery violation. Under *Burnet,* before imposing one of the harsher sanctions allowed under CR 37 for the violation of a

discovery order, the trial court must consider whether the violation was willful, whether it substantially prejudiced the party's ability to prepare for trial, and whether a lesser sanction would suffice. *Burnet,* 131 Wn.2d at 494. *Burnet* only applies when a court imposes one of the harsher CR 37 discovery sanctions for a party's failure to obey a discovery order. *Id.*; *see* CR 37(b)(2). Here, the trial court's ruling did not involve the violation of a discovery order. *See* RP at 847-55. Thus, *Burnet* does not apply.

Even if the trial court was required to engage in a *Burnet* analysis, and even if this Court considers this claim despite Coley's failure to raise the issue at the trial court or make an offer of proof, any error was harmless because Dr. Wollert testified in detail about all components of the diagnosis assigned by the State's expert. A trial court's failure to engage in a *Burnet* analysis is subject to harmless error. *Jones v. City of Seattle,* 179 Wn.2d 322, 356-60, 314 P.3d 380 (2013). Under a harmless error standard, an evidentiary error is grounds for reversal only if it results in prejudice that materially affects the outcome of the trial. *In re Det. of West,* 171 Wn.2d 383, 410-11, 256 P.3d 302 (2011).

Despite the trial court's minimal limitation of Dr. Wollert's testimony about Pedophilia, Dr. Wollert testified, without objection, that he did not diagnose Coley with Pedophilia and explained why one of Coley's crimes does not support pedophilic behavior. *See* RP at 846-47. Dr. Wollert

testified extensively regarding what diagnoses did (or did not) apply to Coley. As the Court of Appeals explained:

> Dr. Wollert later testified about why he did not diagnose Coley with paraphilia or paraphilia not otherwise specified nonconsent. He also explained why he rejected other potential diagnoses, including paraphilic coercive disorder and sexual sadism. And he testified, without objection, that he did not find pedophilia as a diagnosis for Coley.

Coley, 2017 WL 4640320, at *6. The record supports the trial court's findings. Dr. Wollert repeatedly testified that Coley does not suffer from any form of paraphilia. RP at 835-47. He testified that Coley does not suffer from sexual sadism and explained in detail why Coley's crimes are not sadistic. RP at 829-35, 856, 862-64, 884. He testified that Coley does not suffer from Paraphilia NOS Nonconsent or Paraphilic Coercive Disorder. RP at 865-67. When asked if he diagnosed Coley with anything, Dr. Wollert testified that he diagnosed Coley with Antisocial Personality Disorder and Attention Deficit Hyperactivity Disorder. RP at 858. Dr. Wollert testified that Coley does not suffer from a mental abnormality. RP at 882, 947. Rather, he opined that as a juvenile-only sex offender, Coley's sexual acting out is merely evidence of "immature" and "clown-like" behavior and indicative of Coley just "being a goofball." RP at 834-46, 883.[9]

[9] Dr. Wollert testified, "I mean, remember, this is a guy who was called King Ding-a-ling." RP at 840.

Thus, Dr. Wollert testified in detail about all components of the diagnosis assigned by the State's expert.

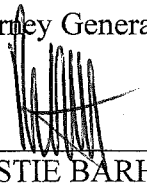
Furthermore, Coley was able to argue his theory of the case in closing. Coley argued that the evidence does not support the diagnosis assigned by the State and that he does not suffer from pedophilia, sexual sadism, a coercive disorder, a mental abnormality, or any paraphilia. RP at 996-1002. Thus, Coley's claims that he "was not permitted to respond to the State's principal diagnosis" and that the opinion of the State's expert "was not subjected to a meaningful adversarial testing" is not supported by the record. *See* Petition at 24; *see* RP at 985-1008. The trial court's minimal limitation of Dr. Wollert's testimony did not affect Coley's ability to present a vigorous defense. Coley fails to show a basis for review.

V. CONCLUSION

Coley has failed to show that review is warranted under RAP 13.4(b). For the foregoing reasons, this Court should deny review.

RESPECTFULLY SUBMITTED this 2nd day of March, 2018

ROBERT W. FERGUSON
Attorney General



KRISTIE BARHAM, WSBA #32764
Assistant Attorney General

WASHINGTON STATE ATTORNEY GENERAL'S OFFICE - CRIMINAL JUSTICE DIVISION

March 02, 2018 - 9:38 AM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	95389-9
Appellate Court Case Title:	In re the Detention of: Gregory Eugene Coley
Superior Court Case Number:	01-2-01150-5

The following documents have been uploaded:

- 953899_Answer_Reply_20180302092809SC497965_7048.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
  The Original File Name was AnswerToPetition.pdf
- 953899_Motion_20180302092809SC497965_0142.pdf
  This File Contains:
  Motion 1 - Overlength Brief
  The Original File Name was Overlength.pdf
- 953899_Other_20180302092809SC497965_0288.pdf
  This File Contains:
  Other - Declaration of Service
  The Original File Name was DecSrv.pdf

A copy of the uploaded files will be sent to:

- MarchK@nwattorney.net
- Sloanej@nwattorney.net
- sarahs@atg.wa.gov

Comments:

Sender Name: Erik Frost - Email: erikf@atg.wa.gov
Filing on Behalf of: Kristie Barham - Email: kristieb@atg.wa.gov (Alternate Email: crjsvpef@ATG.WA.GOV)

Address:
800 Fifth Avenue
Suite 2000
Seattle, WA, 98104
Phone: (206) 464-6430

Note: The Filing Id is 20180302092809SC497965